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IN THE

# Supreme Court of the United States

NO. 78-1508

SKAGGS RUDDER, ET UX

APPELLANTS

V.

WISE COUNTY REDEVELOPMENT AND HOUSING AUTHORITY

APPELLEE

ON APPEAL FROM THE VIRGINIA SUPREME COURT

## BRIEF IN OPPOSITION

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## HISTORY OF PROCEEDINGS

The Appellants' Statement of the History of the Proceedings is substantially correct.

## STATEMENT OF FACTS

The Wise County Redevelopment and Housing Authority, (the Authority), a political subdivision created pursuant to the Virginia Housing Authorities Law, determined that the subject area of the Town of St. Paul, Virginia was blighted with the assistance inter alia of the Town of St. Paul, Lenowisco Planning District Commission, Weeks & Associates, structural engineers, Wingate & Associates, real estate appraisers, Harland Bartholomew & Associates, planning consultants, Thompson & Litton Engineers, the Tennessee Valley Authority and the Department of Transportation of the Commonwealth of Virginia.

A redevelopment project in the



determined slum area of St. Paul, Virginia was initiated with the full cooperation of: the Town of St. Paul and its citizens; TVA to rechannel the Clinch River to prevent flooding; Virginia Department of Highways to construct a four-lane highway; and the Department of HUD to provide federal funding for the removal and prevention of blight and deterioration under a Neighborhood Development Program. It is a multi-million dollar redevelopment plan which is unparalleled in the United States for cooperation with so many diversified Federal and State agencies, and political entities.

Prepared studies, examinations, surveys and evaluations showed that the project area contained approximately 80 acres, excluding the Clinch River, 109 principal buildings, of which 62,

located on 15.1 acres, were classified as structurally substandard requiring or warranting clearance, and 42 others, located on 42 acres, warranted clearance to remove blighting factors (40 subject to periodic flooding, 1 obsolete building type, and 1 improperly located on the land); and the remaining land, with slopes exceeding 50%, was inaccessible during periods of flooding. A majority of all the buildings, residential and non-residential, within the project area were dilapidated. Most of the remaining buildings, streets and a large section of the undeveloped areas were adversely affected by periodic flooding and other blighting factors. See Virginia Supreme Court Opinion Appendix "C" pages 6, 7 and 10, Appellants' Jurisdictional Statement.

The purpose of this project is found in the following exhibits:



(1) Ken Poore Exhibit #1, Comprehensive Plan, Housing Section, pps. 16-22, including Plate 2 (required steps to eliminate blight); (2) Ken Poore Exhibit #4, Feasibility Study, (Va. Sup. Ct. Supp. App. pps. 121-123) (reasons for selection of the project area); (3) Ken Poore Exhibit #5, ND 401: (Development Goals and Objectives) (Va. Sup. Ct. Supp. App. pps. 155-8); paragraph D. (Urban Renewal Techniques to be Used to Achieve Plan Objectives) (Va. Sup. Ct. Supp. App. pps. 164-5), paragraph F. (Other Provisions Necessary to Meet Requirements of Applicable State or Local Law) (Va. Sup. Ct. Supp. App. pps. 165-6).

The project is a full cooperation between the Tennessee Valley Authority, which will re-channel the Clinch River and avoid flooding the St. Paul project area; the Department of Housing and

Urban Development, which will provide for removal and prevention of blight and deterioration and housing sites for the displaced, poor, slum and deteriorated dwellers; and the Virginia State Department of Highways, which will provide a four-lane public highway through the project area, which will benefit both the commercial, industrial and private citizens of the St. Paul area. There will be parks located in the project area, and the primary purpose of the project will be effectuated, which is to rehabilitate a slum or deteriorated area and provide for residential uses, rustic outdoor recreation, commercial businesses, industry, roadways, alleviate flooding, provide a more adequate water supply, alleviate raw sewage being dumped into the Clinch River, and provide more adequate transportation for all the public in this



immediate area. (The project when originally started, was estimated to cost approximately $9 million, and this figure has now escalated to more than $17 million. Acquisition in the project area is now complete except for the Rudders' property.)

However, the Virginia Supreme Court held that "most of the land in the project area after clearance of buildings, rechannelization of the river, and construction of Alternate 58-A and access streets and roads, will be resold to private interests"; that "75% or more of the area would ultimately be controlled by private owners"; and "in addition to the public purpose served by the rechannelization of the river and construction of the new highway, there would remain in the project area 'open spaces for sort of a rustic outdoor development, picnic tables and that

type of thing'." See Virginia Supreme Court Opinion,Appendix "C" page 11, Appellants' Jurisdictional Statement.

An environmental impact statement (E.I.S.) was not prepared by the Authority, but an E.I.S., which is an exhibit filed herein consisting of 235 pages, was prepared by the Department of HUD to assess the environmental impact of Federal funding of the project, which was found to be adequate by the two lower courts, and is recorded in the Federal Register.

## SUMMARY OF THE ARGUMENT

I.

The Trial Court and Virginia Supreme Court did not err in holding that the Authority had the power of eminent domain pursuant to the Virginia Housing Authorities Law to acquire property for the public purpose of erradicating a blighted area and avoiding the recur-



rence of same, when as incidental thereto said property would ultimately be reconveyed for private use. Therefore, this was not a violation of the State and Federal Constitutions; and to hold otherwise would create chaos and confusion in the Law.

II.

The Trial Court and Virginia Supreme Court did not err in holding that it was legally unnecessary for the Authority to file an environmental impact statement prior to the institution of condemnation proceedings; and that the E.I.S. filed by the Department of H.U.D. was adequate as proven by the facts of the case.

III.

The Trial Court and Virginia Supreme Court did not err in holding that blight in the project area was proven by the facts and law of the case.

## ARGUMENT

### I.

### CONSTITUTIONAL ISSUE-- PRIVATE USE OF PROPERTY AFTER ACQUISITION

Appellants' primary argument is that the Authority sought to condemn their property ultimately for private use in violation of the Virginia (Article I, Section 11) and Federal (Amendments 5 and 14) Constitutions.

Rudders rely on this State Constitutional issue to obtain an automatic right of appeal to this court. We submit that this issue is settled by a great majority of the state cases in the United States and by this Court. Therefore, this issue should be considered as a petition for Writ of Certiorari and the Rudders should be denied an appeal or hearing for the reasons cited herein. See 28 USCS §1257(3). It will only waste this



Court's valuable time to hear this case.

There is evidence in this case of public use of the after acquired property, for example: four-lane public highway, public park, recreation areas, sewage treatment plant, possibly public housing and "possibly for a library or clinic or something." (Va. Sup. Ct. Appendix pps. 137-8) . However, the Virginia Supreme Court based its decision on the fact that a majority of the after acquired property would be used or controlled by private individuals. Therefore, that court addressed head-on the constitutional issue, which is now presented to this Court.

"Unquestionably, most of the land in the project area after clearance of buildings, rechannelization of the river, and construction of Alternate Route 58-A, and access streets and roads,

will be resold to private interests. Charles McConnell, Assistant Director of the Authority, conceded that probably seventy-five percent or more of the area would ultimately be controlled by private owners. Tyler Cornett, Executive Director of the Authority, testified that, in addition to the public purpose served by the rechannelization of the river and construction of the new highway, there would remain in the project area 'open spaces for sort of a rustic outdoor development, picnic tables and that type of thing'." See Virginia Supreme Court opinion, Appendix "C", page 11, of Appellants' Jurisdictional Statement.

Pursuant to Title 36 of the Virginia Housing Authorities Law the following code sections have been held Constitutional by the Virginia Supreme Court in authorizing the taking of



private property for other than a public use: Virginia Code Sections 36-48; 36-48.1; 36-49.1; 36-53; and 36-51.1. Such powers of the Authority do not defeat the "public purpose" which occasions the taking of the property because making such property available to private enterprise is merely incidental to the same purpose of the authority and is reasonably designed to prevent recurrence of the conditions producing slum or blighted areas. Mumpower v. Housing Authority, 176 Va. 426, 11 S.E. 2d. 732; Hunter v. Norfolk Redevelopment and Housing Authority, (1953) 195 Va. 326, 78 S.E. 2d. 893; Bristol Redevelopment and Housing Authority v. Denton, (1956) 198 Va. 171, 93 S.E. 2d. 288; Runnels v. Staunton Redevelopment and Housing Authority (1966) 207 Va. 407, 149 S.E. 2d. 882; and Skaggs Rudder, etc. v. Wise County Redevelopment and

Housing Authority, ____ Va. _____, 249, S.E. 2d. 177 (1978).

The Rudders, in their Constitutional arguments, rely on the theory of "public use". They miss the point all together. They argue apples are oranges, which is not relevant. They do not cite or rely on any Redevelopment and Housing Authority cases in the United States or Virginia.

The Rudders argue generally (without touching the real issue of this case) that the use of public funds to acquire private property and then sell it to private individuals is unconstitutional. They cite as authority to this proposition the Virginia case of Rudee Inlet Authority v. Bastian, 206 Va. 906, 147 S.E. 2d. 131. However, in that case in 147 S.E. 2d. at page 135, the Virginia Supreme Court made the distinction as to Housing



Authority cases. In the case at bar the Virginia Supreme Court again said that the Rudee Inlet Authority case is not applicable because in that case "we were not there concerned with the power of eminent domain vested in housing authorities".

The Rudders also rely on the case of Phillips v. Foster, 215 Va. 543, 211 S.E. 2d. 93 (1975), where the Virginia Supreme Court held "a Statute (Code Section 21-428) authorizing condemnation by a private individual of a drainage easement was unconstitutionally applied when the condemnors sought to acquire the easement for the purpose of developing property for private gain." Again the Virginia Supreme Court in the case at bar held that "the Rudders reliance upon Phillips is misplaced". See Opinion of the Virginia Supreme Court in Appendix "C", page 12 of Appellants'

Jurisdictional Statement.

The controlling case in Virginia is Hunter v. Norfolk Redevelopment and Housing Authority, Supra, where the Housing Authority had filed a petition to condemn certain land, alleging that such property was needed to effectuate a slum clearance and redevelopment plan under Virginia Code Section 36-1 et seq. The condemnees had argued that the redevelopment provisions of the statutory law, Virginia Code 36-48 to 36-53 were an unconstitutional attempt to extend the police powers of the state. In this regard, it was argued that a Housing Authority is empowered to make redevelopment land available for use by a private enterprise, and that allowing private persons or agencies to take the land for redevelopment purposes did not amount to a public use. In rejecting this contention the Virginia Supreme Court stated



that:

> "The contention of the condemnees that the taking of their property is for private use misconceives the nature and extent of the public purpose which is the object of this legislation. The primary purpose of the taking is the irradication of 'blighted or deteriorated areas', 'including slum areas', the reconstruction and rehabilitation of the areas, and the adaptation of them to the uses which will prevent a recurrence of the blighted or slum conditions.
>
> In Mumpower v. Housing Authority, 176 Va. 426, 11 S.E. 2d. 732, notwithstanding a similar constitutional attack, we held that the irradication of slum areas and the adaptation of the property to a low-cost housing project, to be leased to tenants, was a public use and a valid exercise of the police power of the state. In that case we further held that the provisions of Section 8(d) of the 1938 Housing Act, now Code Section 36-9(d), empowering the Authority to sell ... transfer ... or dispose of any real ... property or any interest therein', did not defeat the 'public use' which occasioned the taking of the property. 176 Va. at page 456, 11 S.E. 2d. at page 744. That is because such sale or transfer is merely incidental or collateral to the primary

purpose of the act...."

Similarly, under the provisions of the 1946 Act authorizing "Redevelopment Projects", Code §36-48 ff., the primary purpose is the elimination of blighted or slum areas, and the provision in Code §36-53, making property available for redevelopment by private enterprise is merely incidental to such main purpose. The act contemplates that in the course of a large slum clearance operation there will be some sections which are not needed or suitable for long-range public use, and that after being purged of their unwholesome characteristics they will be returned to a restricted private use. Section 36-53 is designed to prevent a recurrence of the conditions which blighted the area by requiring that the land so sold or leased by an authority to private enterprise will be made subject to such restrictions and conditions as will carry out the purposes of the Act.

Similar legislation has been enacted by thirty-two states. (In 1940) Its constitutionality has been upheld against a similar attack by the highest courts of Alabama, Arkansas, Illinois, Maryland, Michigan, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island and Tennessee. Only the courts of Florida and Georgia have held to the contrary. (In 1979 this is no



longer true. See Fla. and Ga. cases cited herein holding with the majority rule now).

The reasoning of the courts which have adopted the majority view is that the primary purpose of the legislation is the elimination and rehabilitation of the blighted and slum sections of the cities, that such purpose falls within the conception of public use, and that when the need for public ownership which occasioned the taking has terminated it is proper that the land be transferred to private ownership, subject to such restrictions as are necessary to effectuate the purposes of the act and prevent the recurrence of the unwholesome conditions. Such resale being it is said, merely incidental to the primary purpose of the taking."

The following is a list of the State cases (a majority in the United States) that hold that a housing authority or other similar agency has the authority to take blighted areas in eminent domain proceedings and reconvey the land to private interests. The public benefit or purpose is the destruction of the slums; the fact that

the land ends up in private hands is incidental to the public use or purpose:

Hunter v. Norfolk Redevelopment & Housing Authority, 195 Va. 326, 78 S.E. 2d 893 (1953)

Bailey v. Housing Authority of City of Bainbridge, 214 Ga. 790, 107 S.E. 2d 812 (1959)

Redevelopment Commission of Greensboro v. Security National Bank of Greensboro, 252 N.C. 595, 114 S.E. 2d 688 (1960)

Blankenship v. City of Decatur, 269 Ala. 670, 115 So. 2d 459 (1959)

Grubstein v. Urban Renewal Agency of City of Tampa, 115 So. 2d 745 (Fla. 1959)

Rowe v. Housing Authority of City of Little Rock, 220 Ark. 698, 249 S.W. 2d 551 (1952)

State v. Land Clearance for Redevelopment Authority, 364 Mo. 974, 270 S.W. 2d 44 (1954)

Nashville Housing Authority v. City of Nashville, 192 Tenn. 103, 237 S.W. 2d 946 (1951)

Miller v. City of Louisville, 321 S.W. 2d 237 (Ky. 1959)

Davis v. City of Lubbock, 160 Tex. 38, 326 S.W. 2d 699 (1959)

Foeller v. Housing Authority of



Portland, 198 Ore. 205, 256 P. 2d 752 (1953)

Rabinoff v. District Court, 145 Colo. 225, 360 P. 2d 114 (1961)

State v. Urban Renewal Agency of Kansas City, 179 Kan. 435, 296 P. 2d 656 (1956)

Isaacs v. Oklahoma City, 437 P. 2d 229 (Okla. 1966), cert. denied, 389 U.S. 825 (1967)

Crommett v. City of Portland, 150 Me. 217, 107 A. 2d 841 (1959)

Herzinger v. Mayor & City Council of Baltimore, 203 Md. 49, 98 A. 2d 87 (1953)

Velishka v. City of Nashua, 99 N.H. 161, 106 A. 2d 571 (1954)

Wilson v. City of Long Branch, 27 N.J. 360, 142 A. 2d 837 (1958)

Schenck v. City of Pittsburgh, 364 Pa. 31, 70 A. 2d 612 (1950)

Balsamo v. Providence Redevelopment Agency, 84 R.I. 323, 124 A. 2d 238 (1956)

Randolph v. Wilmington Housing Authority, 37 Del. Ch. 202, 139 A. 2d 476 (1958)

Chicago Housing Authority v. Berkson, 415 Ill. 159, 112 N.E. 2d 620 (1953)

Papadinis v. City of Somerville,

331 Mass. 627, 121 N.E. 2d 714 (1954)

Cannata v. City of New York, 11 N.Y. 2d 210, 183 N.E. 2d 395 (1962)

State ex rel. Bruestle v. Rich, 159 Ohio St. 13, 110 N.E. 2d 778 (1953)

In re City of Center Line, 387 Mich. 260, 196 N.W. 2d 144 (1972)

S.O. Realty Co. v. Sewerage Commission, 15 Wis. 2d 15, 112 N.W. 2d 177 (1961)

Pilley v. City of Des Moines, 247 N.W. 2d 187 (Iowa 1976)

Redevelopment Agency v. Hayes, 122 Cal. App. 2d 777, 266 P. 2d 105 (1954)

Boise Redevelopment Agency v. Yick Kong Corp., 94 Idaho 876, 499 P. 2d 575 (1972)

Fishman v. City of Stanford, 159 Conn. 116, 267 A. 2d 443 (1970)

Hawley v. South Bend, ____ Ind. ____, 383 N.E. 2d 333 (1978)

Housing and Redevelopment Authority v. Froney, 305 Minn. 450, 234 N.W. 2d 894 (1973)

Paulk v. Housing Authority of Tupelo, 195 So. 2d 488 (Miss. 1967)

Miller v. City of Tacoma, 61 Wash. 2d 374, 378 P. 2d 464 (1963); City of Seattle v. Loutsis Investment Co., Inc., 16 Wash. App. 158, 554 P. 2d 379 (1976)



See also 44 A.L.R. 2d 1414.

This Court has established the well settled majority view on this point in Berman v. Parker 348 U.S. 26, 99 L Ed. 27, 75 S. Ct. 98 (1954), which remains the law in 1979.

Berman v. Parker was an eminent domain proceeding in the City of Washington, D.C., to remove blight and slum areas, redevelop and eradicate future recurrence of such areas. The appellants contended that its commercial property "will be put into the project under the management of a private, not public use." ... and that "private property is being taken contrary to two mandates of the Fifth Amendment--(1) 'No person shall ... be deprived of ... property, without due process of law'; and (2) 'nor shall private

property be taken for public use, without just compensation'." This theory was rejected by the United States Supreme Court in Berman.

This Court said, "In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress... or the States legislating concerning local affairs...".

> "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end.
>
> * * * *
>
> ... Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one business for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine once the public purpose has been established.... The public end may be as well or better served through an agency of private enterprise than through a department of government--or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects...."
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> * * * *
>
> "The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented.... Hunter v. Norfolk Redevelopment & Housing Authority, 195 Va. 326, 338-339, 78 S.E. 2d 893, 900-901...."



It is also respectfully submitted that if this Court were to decide that the Virginia Housing Authorities laws are unconstitutional, this result would create chaos and confusion in the State of Virginia and throughout the United States for the following reasons:

(1) It would stop the public

clearance and recurrence of blight and slum areas in the United States;

(2) It would put the Department Of Housing and Urban Development out of business;

(3) It would overturn all the housing and redevelopment laws in the United States;

(4) The redevelopment and housing authorities in each state would flood this Court with cases endeavoring to obtain a different interpretation of their statutes by this Court.

(5) It would lead to more appellate review because attorneys would try to make Court decisions "retroactive" which would create thousands of appeal cases and mass confusion in the law; and

(6) All redevelopment and housing projects would be in jeopardy in Virginia and all other states in the Union.

The Rudders have shown nothing by way of law or fact to warrant a re-examination of the settled principles of the Housing Authorities Laws of the State of Virginia or the United States as heretofore set forth



in the cases and statutes cited.

Wherefore, the Authority respectfully submits that the Virginia Housing Authorities Laws are constitutional, proper and will aid in the elimination or prevention of blight and/or deteriorated slum areas in the St. Paul Project Area. Futhermore they conform to the sale of property (after acquisition) to private individuals (or public uses) because said sales are incidental or collateral to the primary purpose of the Housing Authorities Laws of Virginia.

Under the cases considering this question, it is clear that once it is established that the taking is for a public purpose, the subsequent sale of the property for private use is authorized.

Under the Hunter case, the primary purpose for the taking under the Redevelopment laws is the irradication of blighted areas and the prevention

and recurrence of blighted conditions. In this case, the taking of the area and subsequent redevelopment of that area is to prevent both the occurence and the recurrence of blighted areas. Thus, the primary purpose is being served by the Authority here. Even though it is clear from the cases which have examined this issue that the entire project area may be devoted to a private use once the public use has been established, in this case, the total project area will not be devoted to private use once the subject area is taken. The project area also will contain a four-lane public highway, public park and recreation areas, and the Clinch River will be re-channeled for the public health, safety and welfare of the citizens. That the public use is being served in this case provides sufficient justification for the



resale of portions of the project area for private use.

II.

FACTUAL ISSUE--ENVIRONMENTAL IMPACT STATEMENT ADEQUATE

There is no constitutional or legal requirement for the Wise County Redevelopment and Housing Authority (the Authority or W.C.R.H.A.) to file an environmental impact statement (E.I.S.), nor is such filing prerequisite to the Authority's power of eminent domain.

The Rudders argue that an environmental impact statement should be required by the Virginia Constitution, and they cite the Rappahannock v. Vepco case and the argument by A. E. Howard pursuant to Article XI., Section One of the Virginia Constitution. However, the Virginia Constitution does not specifically set forth any requirements for the filing of an E.I.S., and Mr. Howard is only philosophizing on what

the law should be in the future in order to protect man's environment. Appellants also request that this Court legislate new laws and make them retroactive, which responsibility lies with the Virginia General Assembly to make new laws.

The W.C.R.H.A. is a political entity created pursuant to the Virginia Housing Authorities Law, and as such must be guided by the specific laws expressed therein. Nowhere in the Virginia Housing Authorities Act is it required to file an E.I.S. or prove that same is adequate and/or sufficient. The Rappahannock case cited above by the Rudders is not applicable to the issue herein for the primary reason that it was not a Housing Authority case nor a redevelopment project.

The Rudders argument that an E.I.S. should be required by the Virginia



Constitution is merely conjectural, argumentative and suggestive. There is no legal requirement in the Virginia Constitution nor in any case of the Supreme Court of Virginia, which requires an environmental impact statement before such project is undertaken, or before the power of eminent domain can be instituted. The Rappahannock case "appears to suggest" (emphasis mine) that an environmental impact statement is needed for major construction projects. The Authority submits that the Rappahannock case in no way suggests or demands that an E.I.S. be prepared in any case in Virginia, much less the case at bar.

The Virginia Supreme Court made the identical conclusion when it said in the opinion of this case, "no such statement (E.I.S.) is required by that Constitutional provision (Article XI, Section One), by any Virginia statute,

or by the case cited by the Rudders, Rappahannock League v. Vepco, 216 Va. 774, 222 S.E. 2d. 802 (1976)". See Virginia Supreme Court opinion, Appendix "C", page 13 of the Appellants' Jurisdictional Statement.

The Rudders also argue that due to the Federal participation in this project in the form of funding by the Department of Housing and Urban Development constituted "major federal action significantly affecting the qualify of the human environment", for which an environmental impact statement is required. Rudders cite 42 U.S.C. Section 4332(2)(c). Your appellee admits that this is the law, and that the Department of H.U.D. was required to file an E.I.S. prior to funding. This was done by the Department of H.U.D. and was made an exhibit in the case, is 235 pages in length and addresses a multiplicity of points and



issues directed to the environment of the St. Paul Project Area.

Again the Rudders fail to cite any redevelopment and housing authority cases in the State of Virginia or in any other state in the Union. However, the Rudders do cite the New York case of Citizens for Clean Air, Inc. v. Corps of Engineers, U.S. Army, and the case of Scottsdale Mail v. State of Indiana. These two cases are cited by the Rudders to block the Authority's right to proceed with the Redevelopment Project because it failed to prepare an adequate environmental impact statement. However, the Indiana case turned on dicta on a procedural requirement that the E.I.S. be filed, and the New York case held that an E.I.S. had not been prepared. Therefore, these two cases are not applicable because an adequate E.I.S. statement was prepared in this

case, and there was sufficient evidence to support this finding both by the Circuit Court of Wise County and the Virginia Supreme Court. See Virginia Supreme Court opinion at Appendix "C", pages 13 and 14 of the Appellants' Jurisdictional Statement.

The Authority submits that the E.I.S. is more than sufficient and adequate, has discussed and addressed all relevant factors involving the environment in the Project Area. The E.I.S. was prepared by the lead agency, Department of H.U.D., in cooperation with Tennessee Valley Authority (T.V.A.) and the Department of Transportation of the Commonwealth of Virginia (Highway Department) with the aid and assistance of Mr. Kenneth Poore of the planning consultant firm of Harland Bartholomew and Associates (Virginia Supreme Court Supplemental Appendix, pages 2-4). The



E.I.S. was prepared pursuant to the National Environmental Policy Act of 1964 with the purpose of determining whether or not the environmental impacts are so adverse to justify terminating the project (Virginia Supreme Court Appendix, page 257). Furthermore, the primary purpose of the E.I.S. was not to make a recommendation, but only to make a statement of those things investigated, and to determine for the benefit of H.U.D. and the Federal Government whether or not the project was worthy of federal funding (Virginia Supreme Court Appendix, page 262). The E.I.S. was submitted to several state and federal environmental agencies, (a list of which is exhaustive and included in the E.I.S. Exhibit), who were requested to submit objections and recommendations, which was done extensively. The response from all of these agencies was favorable to the

project, and there were no objections, but several suggestions were made by these agencies. The E.I.S. is now a part of the Federal Register, and was overwhelmingly approved.

Dr. Charles Bartlett, a Geology professor, and Don Mullins, an engineer and surveyor, testified for the Rudders that the E.I.S. was inadequate because of its failure to address the issues of dust creating black lung, vibrations, flyrock, earthquakes causing property damage, and that the ground water supply would be damaged in the St. Paul area. It is submitted that Rudders' expert witnesses were speculating as to any damages and making conclusions assuming facts which were not in existence at the time.

The Rudders failed to introduce any medical evidence that the removal of dust in the Project Area would create black



lung or increase the presence of pneumoconosis to the citizens of St. Paul. Even to suggest this appears ridiculous in that it is a known fact that persons do not obtain black lung by living near where dust is being removed in state highway construction projects.

The Rudders produced speculative evidence as to earthquake damage, vibration damage, flyrock damage to private property in the St. Paul area and compared this with a project in the City of Norton, Virginia, which has no bearing or no relationship to the case at bar. Kenneth Poore testified at Virginia Supreme Court Appendix page 27 that "the contractor who would be responsible for doing the excavating work would have to comply with the regulations of the Virginia Department of Highways, subject to the review and approval by H.U.D." The Authority must

assume that the contractors involved in the explosions and blasting operations in completing this project would act in a reasonable manner pursuant to the requirements by the Department of Highways, the Department of H.U.D., their insurance companies, management, the regulatory measures of the Town of St. Paul, etc. In other words, it would be a matter of conjecture to say at this time that the contractors in their blasting operations would be negligent in any way whatsoever. In the event these blasting operations do create damage, the injured parties could seek and obtain their proper court remedy.

It is respectfully submitted that whether or not the E.I.S. was adequate is a factual issue; that this issue has been proven; that the E.I.S. is substantially adequate and is not deficient; that the lower courts



have found evidence sufficient to support the adequacy of said statement. Therefore, this Court should not now review the facts again, since they were factually correct, have been approved and found adequate by the Circuit Court of Wise County, Virginia and the Virginia Supreme Court. This Court should not waste its time deciding this factual issue for a third review.

The Rudders for the first time on appeal to this Court raise the issue that the Virginia Supreme Court erred in upholding by "implication" the constitutionality of Section 36-48 (1) and 36-49 of the Code of Virginia because they allowed the Authority to condemn private property whose only real public purpose was the rechannelization of the Clinch River, and where the Federal Government has pre-eminent control of navigable water under the Federal Constitution.

We submit that this issue was not raised in the Lower Courts. Therefore, we request that this point not be now considered or reviewed by this Court. The appellants have waived their rights as to any legal matters relevant to this particular issue at this time.

However, in response to the issue, the Authority categorically denies that the only real public purpose was the rechannelization of the Clinch River for this St. Paul Project. There is more than sufficient and adequate evidence throughout the trial of this case that this was not the only reason for the project. The reason for the project was to irradicate slum or blighted areas, avoid recurrence of same, and redevelop the area in question for the benefit of the public at large.

However, we do admit that the



Clinch River is a navigable stream and is subject to Federal control. Nowhere in the Virginia Statutes or in the Constitutions of Virginia and the United States does it require that before a redevelopment and housing authority institutes eminent domain proceedings that the Corps of Engineers approve of such proceeding. It is admitted that the rechannelization of the Clinch River will not go forward until final approval of the Chief Engineer of the Army Corps of Engineers is obtained. This approval is now being finalized in Washington, D.C.

III.

FACTUAL ISSUE--BLIGHT PROVEN

The Rudders also contend that Section 36-'8.5 of the Virginia Code, as amended, is unconstitutional and the Virginia Supreme Court erred in so holding. Again this is the first time on appeal to this Court that this issue has been raised as to the unconstitutionality of Virginia Code Section 36-48.5. Therefore, this issue should not be reviewed by the United States Supreme Court.

Appellants also argue that the Virginia Supreme Court erred in "impliedly" holding Virginia Code Section 36-49 constitutional under the substantive due process provisions of the Fourteenth Amendment of the U. S. Constitution. They rely on the argument that the St. Paul Project Area is not an urban area but is a rural setting. It is true that the Project Area is located within the limits



of the small town of St. Paul, in a rural area. However, there is no Virginia statute that legally requires the area to be urban in nature. The word "urban" does not appear in the Virginia Housing Authorities Law. Moreover, the statutes are explicit as to the requirements and guidelines for proof of blight in a particular area, and these blighting factors have been proven by adequate and sufficient evidence, which has been approved and/or affirmed by two lower courts in this case.

There is more than adequate and sufficient proof in the testimony and exhibits showing the Virginia State and Federal guidelines of proof of blight in this particular case. The Federal guidelines are less restrictive than the Virginia State guidelines as to proof of blight. However, this proof has been

substantiated for both the Federal and State guidelines and has been so approved and affirmed by the two lower courts. The following reports indicate the proof of both Federal and Virginia requirements for the environmental deficiencies of blight in the St. Paul Project Area, and are found in the Virginia Supreme Court Supplemental Appendix, pages 129-143, and page 183-185. These reports and evidence, which were admitted in the trial court without objection by the Rudders, show the environmental deficiencies, evidence supporting the finding of eligibility and the blighting influences, and also include the Virginia and Federal requirements to prove blight which were substantiated in said exhibits.

It appears that the Rudders argue that all of Southwest Virginia is blighted, and this we certainly deny.



The Rudders ignore the proposition that blight must be proven pursuant to the requirements of Virginia in an area as a whole, which has been done in this case and is merely a factual issue now. This Court looks with disfavor to the review of factual disputes and issues.

The Rudders continuously agrue that this is a "land grabbing case", which we categorically deny, and state that there is no proof whatsoever of such an allegation in this case. Appellants cite the Myles Salt Company, Lt. v. Board of Commissioners, 239 U.S. 478, 60 L.Ed. 392, 36 S.Ct. 204 (1916), a Louisana case which apparently turned on the point that the local board had tried to condemn property "solely to obtain income from it". This certainly would be error, but there is no evidence whatsoever of such an attempt in the case at bar. Therefore, substantive due process was not violated,

and the Myles case is not applicable to the case at bar.

With reference to the theory of "substantive due process" the appellants cite the case of Bristol Redevelopment and Housing Authority v. Denton on page 80 of its Jurisdictional Statement, and cite to this Court "dicta" which has no relevancy to the case at bar. It is apparent that that issue was not before the Virginia Supreme Court in the Denton case, and therefore they did not address the point at that time. Certainly in the case at bar it was not necessary to address this point, since there were many other adequate and sufficient blighting conditions proven in the case, which did not necessitate any further discussion of other blighting conditions or factors.

The Virginia Supreme Court in its opinion held that the Rudders failed to



carry their burden of proving by clear and convincing evidence that the Authority's finding of blight was arbitrary and unwarranted, or that the trial court's similar finding was contrary to the evidence or without evidence to support it. Therefore, the Virginia Supreme Court held that there was no reversible error in the factual issue of proof of blight.

The questions of proof of blight and the sufficiency of the environmental impact statement turn on the particular facts of this case alone and are of interest only to the parties to it. In essence appellants ask this Court to make a third review of the lengthy trial record to see if it can find what two previous courts have been utterly unable to find--absence of blight in the Project Area as a whole and an inadequate environmental impact

statement. This Court has ruled that such fact canvassing is not a task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts". United States v. Johnson, 268 U.S. 220, 227 (1925). Moveover, in the realm of factual review and analysis, the rulings of the courts below are treated with and entitled to great weight. In the present case, appellants raise two questions turning entirely on the facts of this case, already resolved twice in favor of the appellee, and without any impact outside the limits of this case. Certiorari, therefore, on these two factual issues should be denied.

## CONCLUSION

The constitutional issue involves the legal question of whether the condemnation in this case was an authorized taking. Appellants contend that it was



not a public use, but was instead for a private use because privately owned homes and businesses would be built on the acquired land. The appellants misconstrue and confuse the term "public use" with "public purpose" ignoring that the primary public purpose of blight irradication is a sufficient basis for condemnation under the Virginia Housing Authorities Law, the Virginia Supreme Court decisions and the highest court decisions in the majority of the other states and this Court. The disposition of land after acquisition although designed to prevent a recurrence of the blighted conditions, is incidental and subordinate to the primary public purpose of eliminating blight in a Project Area. To hold otherwise would create chaos and confusion in the Law.

With regard to the issue of the

filing and/or adequateness of an environmental impact statement, appellants ignore that no such statement is legally required by Article XI, Section One, of the Virginia Constitution, by any Virginia statute, or by any Virginia case. In fact, the Department of H.U.D. filed a voluminous analytical environmental impact statement, which was supported by substantial evidence as found and affirmed by two lower courts.

The blight issue is a mixed question of law and fact involving whether the St. Paul Redevelopment Project was blighted under the Virginia Housing Authorities Law. That would be a factual matter, which has been correctly decided in favor of the Authority by the Circuit Court of Wise County and the Virginia Supreme Court. The evidence supported the determination by the Authority, the finding of the trial court and the



Virginia Supreme Court that a majority of all buildings, residential and non-residential, within the Project Area were dilapidated and most of the remaining buildings, the streets and a large section of the undeveloped areas were adversely affected by periodic flooding and other blighting factors. Appellants failed to prove by clear and convincing evidence that the Authority's finding of blight was arbitrary and unwarranted, or that the lower court's similar finding was contrary to the evidence or without evidence to support it, which said findings were affirmed by the Virginia Supreme Court.

For the foregoing reasons appellee respectfully requests that the Appellants' Jurisdictional Statement be considered as a Petition for a Writ of Certiorari, and accordingly, should be denied by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a Xerox copy of the foregoing Brief in Opposition was mailed to S. Strother Smith, III, Esquire, at his office at 117 West Main Street, Abingdon, Virginia 24210, on the 20th day of April, 1979, by depositing a copy of same in the United States Post Office with first class postage prepaid, and that the printer has been instructed on the same date to send him three (3) copies



of the printed briefs.

J. Robert Stump
J. ROBERT STUMP